THE LIMITATIONS UPON THE AMENDING POWER

THE manner in which and the means by which the Constitution of the United States may be amended are prescribed in Article V of the Constitution, which reads as follows:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided, that no Amendment, which may be made prior to the Year One thousand eight hundred and eight, shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article [relating to slavery]; and *that no State shall, without its consent, be deprived of its equal Suffrage in the Senate.*"

Until lately, it appears never to have occurred to any one in this country that there need be any fear that the Constitution could be too readily amended. On the contrary, the prevailing impression was that it was almost impossible to amend that great instrument, except by something in the nature of a revolution.

The events of the past few years, however, have revealed for the first time a danger to the American Union, and to the perpetuity of our institutions, based as those institutions are, to so great an extent, upon the right of local self-government, which the framers of the Constitution could not possibly have foreseen, else they might have taken more effective measures to guard against it.

If the framers of the Constitution had been told that the time would ever come in the United States when a comparatively small but highly organized and determined minority could cause the legislatures of numbers of states to ratify amendments to the Constitution of the United States contrary to the well-known sentiments and wishes of a vast majority of the people of those states, recently

manifested at the polls, the suggestion would probably have been received with absolute incredulity; and if the further suggestion had been made that the ratification of amendments could be secured in that way, which would strip the people of the states of an important part of their legislative powers, such as the right to determine who should be qualified to vote for state officers, or the right to regulate their own habits in regard to eating and drinking, that incredulity would have been still greater. Nevertheless, the American people are now witnessing exactly such a spectacle.

Even in so long-established and conservative a state as Massachusetts, within a few months after the people of the state had voted down a proposition to confer the right (and impose the corresponding duty) of voting upon their women, the legislature of the state adopts a resolution ratifying the Federal Woman's Suffrage Amendment; thereby seeking to deprive the people of Massachusetts, perhaps forever, of the power to regulate this matter for themselves, and to *change the law* in case it should prove unsatisfactory in its operation, and at the same time seeking to force the same condition upon other states whose legislatures may reject the amendment.

The same thing has occurred in a number of states in connection with the ratification of both the Woman's Suffrage and the Prohibition Amendments.

The means by which legislative bodies can be controlled in this manner, so as to cause them to vote contrary to the wishes of their constituents, and to deprive the states of one part of their legislative power after another, is not the subject of our present inquiry. We may not understand as yet, and it may be that we will never understand fully, how this thing is done, but we do know that it can be done, and is done.

Now it is obvious, of course, that if by amendments, or measures in the guise of amendments, to the Federal Constitution any part of its legislative territory, so to speak, may be taken away from a state and annexed to the federal government, it may be only a question of time when all the legislative powers of the state legislatures will be absorbed, so that the state will continue to exist only in name.

The question, therefore, naturally arises: Is there any limit to the right and power to amend the Constitution, which was con-

ferred upon the legislatures of three fourths of the states, by the people of the United States in adopting the article above quoted?

It must be frankly admitted that the idea seems to have generally prevailed, even among lawyers, in this country, that there is something sacred — immutable — about an amendment to the Federal Constitution, and that when once an amendment has been ratified by legislatures of three fourths of the states, its validity as a part of the Constitution is not open to question.

In this article it is proposed to point out, as briefly as may be, some of the considerations which ought to be taken into account before any such conclusion shall be finally adopted.

I

It may be safely premised that the power to "amend" the Constitution was not intended to include the power to *destroy* it. The purpose of "the people of the United States" in adopting this Constitution, as expressed in the preamble, was, "to form a more perfect Union" *of the States* — a Union more perfect than the "perpetual" Union which had been established under the original Articles of Confederation.

It is not conceivable that the people, when they conferred upon the legislatures of three fourths of the states the power to amend this Constitution, intended to authorize the adoption of any measures, under the guise of amendments, the effect of which would be to destroy, wholly or in part, any of the members of this perpetual Union.

It may be safely assumed that the scholarly men — the great lawyers — who constituted the Committee on Style of the Constitutional Convention of 1787 clearly understood the meaning and scope of the term which they employed:

"The term *Amendment* implied such an addition or change within the lines of the original instrument as will effect an improvement, or *better carry out the purpose for which it was framed.*" [1]

Clearly, if the purpose of the framers of the Constitution was to establish a perpetual union of the states, it could not have been the purpose of the framers of that instrument, or of the people who adopted it, in authorizing the legislatures of three fourths of the

[1] Livermore *v.* Waite, 102 Cal. 113, 119, 36 Pac. 424 (1894). Italics are author's.

states to amend it, to adopt any amendment which would destroy the states, or any of them, by depriving them of all their local legislative powers.

If, for example, an amendment were adopted in this way whereby the New England states were deprived of the right to levy taxes for the support of their state governments, and that power transferred to the central government at Washington, it would not be seriously contended that such an amendment would be valid; and the reasons why it would not be valid have been made very clear by the Supreme Court of the United States in a number of cases dealing with other powers granted in the Constitution to the states, and especially in connection with the taxing power and the treaty-making power.

In Section 8 of Article I of the Federal Constitution the taxing power is conferred upon Congress in terms quite as broad as those by which the amending power is conferred upon the legislatures of three fourths of the states in Article V, above quoted. Under that section Congress is given the power "to lay and collect taxes, duties, imposts and excises, and to provide for the common defense and the general welfare of the United States." Nowhere in the Constitution is there any express limitation upon this taxing power.

Nevertheless, the Supreme Court held, in the case of *Collector* v. *Day*,[2] that an Act of Congress imposing a tax upon the salaries of state officials was void, because of the *tendency* of such laws to destroy the states, and thereby destroy the Union. In the course of the opinion of the court, as delivered by Mr. Justice Nelson in that case, it is said:

"The cases of *McCulloch* v. *Maryland*, 4 Wheaton, 316, and *Weston* v. *Charleston*, 2 Peters, 449, were referred to as settling the principle that governed the case, namely, 'that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.'

"The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch* v. *Maryland:* 'If the states,' he observes, 'may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the gov-

[2] 11 Wall. (U. S.) 113 (1870).

ernment to an excess which would defeat all the ends of government. This,' he observes, 'was not intended by the American people.'

" . . . And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the states depending upon their reserved powers, for like reasons, equally exempt from Federal taxation?" [3]

Again, in the case of *Lane County* v. *Oregon*,[4] the Supreme Court had to deal with the question of the validity *vel non* of an Act of Congress under which it was claimed that the state of Oregon was required to accept, as legal tender, notes of the United States in payment of state taxes. The right of Congress to provide for the issue of legal tender notes was not denied, but the act was held void, in so far as it might require a sovereign state to accept these notes in payment of its state taxes, because it would have the effect of taking away from the state, in some measure, its taxing power — a power without which it could not continue to exist as a state, within the meaning of the Constitution. To quote from the opinion of the court in that case:

"On the other hand, the people of each State compose a State, having its own government, and *endowed with all the functions essential to separate and independent existence.* The States disunited might continue to exist. Without the *States in union* there could be no such political body as the United States. . . .

". . . Now, to the existence of the States, themselves *necessary to the existence of the United States*, the power of taxation is indispensable. It is an essential function of government. . . . If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered." [5]

In other words, the acts of Congress called in question in these cases were held by the Supreme Court to be void, for the reason that the court could not believe, notwithstanding the broad, general, and unqualified terms in which the power to levy taxes was conferred upon Congress, that it could have been the intention of

[3] 11 Wall. (U. S.) 123, 125 (1870).
[4] 7 Wall. (U. S.) 71 (1868).
[5] *Ibid.*, 76, 77. Italics are the author's.

the framers of the Constitution of the United States, or of the people of the United States in adopting that Constitution, to confer upon Congress the right to destroy a state, by taking away, or crippling, in whole or in part, any of the functions essential to its existence as a state.

Now, as already observed, the language with which the taxing power is conferred upon Congress, in the Constitution, is no less broad and unqualified than the language in which the power to adopt amendments is conferred upon the legislatures of three fourths of the states by Article V, which provides for amendments. Both of these powers are *delegated* powers, pure and simple.

Congress has no inherent power to adopt, and the legislatures of three fourths of the states have no inherent power to ratify, any amendment to the Constitution of the United States, and make it binding upon nonassenting states. The power to do so is derived entirely from the grant in Article V of the Constitution itself.

If the grant, in general terms, of the power to levy taxes does not confer upon Congress the power to levy any taxes which would impair the integrity, the autonomy and independent existence of the states, and thereby destroy the Union, which cannot exist without the states, as a *perpetual Union of States*, it would seem clear, by a parity of reasoning, that the grant of the power to amend the Constitution cannot be deemed to have been intended to confer the right upon Congress, with the assent of the legislatures of three fourths of the states, to adopt any amendment, or any measure under the guise of an amendment, which would have the same tendency, that is, the tendency to destroy the states, by taking from them, directly, any branch of their legislative powers.

The result would be the same in both cases. As was said by Chief Justice Marshall, in *McCulloch* v. *Maryland:* "The power to tax involves the power to destroy."

A right to tax would do little harm, perhaps, if the tax were light, but there is no definite point at which the line can be drawn; hence the power to tax the instrumentalities of the state government is denied absolutely, though there is no express provision in the Constitution denying this right.

So with the amending power. A so-called amendment which takes from a state the right to legislate with reference to the drinking habits of its people might not seriously interfere with the

state's autonomy. It would leave a vast field of state legislation uninvaded.

But it would be the beginning of the end. The next thing to be taken away might be the right to regulate the domestic relations, the right to fix the devolution of estates, the right to dispose of property by will, the right to determine the kinds of property which the people of the states might be permitted to own, etc., *ad infinitum*, until the state would cease to exist; certainly in the sense in which the word "state" is used in the Constitution of the United States.

II

But, aside from all this, there is one express limitation placed upon the amending power in Article V of the Constitution which is still in force. It is provided in that article that no amendment shall be adopted which shall deprive any state of its equal representation in the Senate.

It would seem to be manifest that this prohibition could not be nullified, indirectly, by taking away from the state any of those functions which are essential "to its separate and independent existence" as a state. Certainly the legislative power, the right to make laws for its own government, must be deemed one of those functions.

If by successive amendments a state could be deprived of its legislative powers, it would cease to be *the* state, which is guaranteed, by this limitation upon the amending power, perpetual, equal representation in the Senate.

III

There is another view of this subject which has been suggested by one of the greatest legal minds of the country, and which, it is submitted, is entitled to the serious consideration of the legal profession.

That view is that Article V of the Constitution whereby power is conferred upon Congress, with the assent of the legislatures of three fourths of the states, to propose "amendments," was never intended to confer upon Congress the power to enact ordinary *legislation* in that way, and thus make it irrepealable by Congress and binding upon future generations of Americans.

In other words, the proposition is that even though it should be deemed competent, under Article V of the Constitution, to adopt amendments taking away from the states the right to legislate with reference to the ordinary subjects of state legislation, and transfer to Congress the power to legislate on those subjects, it by no means follows that any measure would be valid which, instead of conferring this power upon Congress, should constitute in itself *direct* legislation on these subjects.

The Constitution of the United States, together with the original amendments thereto, constitute a framework of government. It creates certain bodies through which the three great governmental functions — the legislative, executive, and judicial — shall be exercised, and, in addition to that, prescribes certain restrictions upon the exercise of these various powers, intended for the protection of the liberties of the individual and the integrity of the state.

It provides who shall legislate and how, and subject to what restrictions, but it does not itself legislate, and certainly not upon any subjects concerning which there was, at that time, any difference of opinion in the English-speaking world.

To have done so would have been to commit the gravest imaginable folly, for it is of the very essence of civil liberty that a people shall have the right to change their laws from time to time, and not be compelled to live under laws enacted in previous centuries by their ancestors which may have become totally unsuited to their changed conditions.

Hence it is that the framers of the Constitution, and of the amendments, the adoption of which, in the first instance, was necessary to secure the ratification thereof, were extremely careful to avoid embodying in it anything in the way of legislation.

IV

But it may be said that the arguments above adduced against the validity of the Woman's Suffrage Amendment, the Prohibition Amendment, or similar amendments, taking away the legislative powers of the states, and themselves taking the form of legislation of a practically irrepealable character, could be urged against the so-called War Amendments, that is the 13th, 15th, and possibly parts of the 14th Amendments.

As a practical matter, it must be conceded that unless this objection can be met, it could hardly be expected that the Supreme Court of the United States would give serious consideration to these arguments.

Now it must be admitted that if, at the time of the adoption of the so-called War Amendments, or within a reasonable time thereafter, their validity had been challenged on the above grounds, it might have been found that they were open to those very objections, and it will not be doubted but that the court which had the courage to go the lengths which the Supreme Court of the United States did in those days, in such cases as the Slaughter House cases, for example, to preserve the integrity of the *Federal Union*, would have given full and careful consideration to these objections.

But it is respectfully suggested that the objection in question may be met by the following considerations:

It will not be disputed that if the 13th, 14th, and 15th Amendments had been adopted in the same manner and by the same authority which adopted the original Constitution, there could be no question as to their validity, and a little consideration will serve to show that to all intents and purposes they have been so adopted, and now have the same indisputable sanction.

How then, and by whom, was the original Constitution adopted?

Let the answer be found in the language of Chief Justice Marshall, in delivering the opinion of the court, in the Supreme Court of the United States, in the great case of *McCulloch* v. *Maryland*:[6]

"In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

"It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the

[6] 4 Wheat. (U. S.) 316, 402 (1819). Italics are the author's.

people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States — and where else should they have assembled? *No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.* Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

"From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."

Now, it will not be denied that if the people of the United States when they were adopting the original Constitution, in the manner thus described by Chief Justice Marshall, had seen fit to do so, they could, in the exercise of their ultimate sovereign powers and right to adopt any government or laws which they saw fit, have incorporated in it the same provisions which are substantially embodied in the so-called War Amendments.

And it will also be conceded that even though the state legislatures of fifty years ago had no right, power, or authority, under Article V, to adopt such amendments as these so-called War Amendments — such power not having been delegated to those legislatures by the people, in adopting Article V — nevertheless, if after these so-called War Amendments were thus adopted the people had assembled in convention, either in one national convention or in separate conventions held in each state, and ratified that action of the state legislatures, the validity of these amendments would have been put beyond question.

And have the people of the United States not done what amounts in effect to the same thing, when for fifty years they have deliberately acquiesced in the enforcement of those amendments?

For more than forty-five years the validity of not one of those amendments was ever challenged, although infinite opportunities to contest their validity had presented themselves.

After some forty-five years a question as to the validity of the 15th Amendment was raised in the case of *Myers* v. *Anderson*,[7] and it may be — of course this can only be surmised — that the Supreme Court had some of the above considerations in mind when it refrained from expressing any opinion on this question, and let it pass *sub silentio*.

However that may be, by so doing, the court left itself free to deal with these considerations whenever they shall arise in future, under the class of amendments which have been discussed.

No matter what may have been the defects in the War Amendments — no matter how unauthorized might have been their adoption — it must be conceded that no court in the world could be blamed for declining to consider objections to their validity after such a long period of universal assent and implied ratification by the whole people of the United States. Therefore it would seem only reasonable to believe that when this question as to limitations to the Amending Power shall come before the Supreme Court, that great tribunal will deem itself free to deal with it on its merits.

Of course it can be urged with great force against the construction of Article V, herein suggested, that it would have the effect of narrowing the scope of the grant of power to amend, contained in that article, to such an extent as might result in grave inconvenience in the future.

Indeed, on first impression it might be thought that it would to a great extent render ineffective and valueless that grant.

So far as the first objection is concerned there can be no denial of the proposition that many and great inconveniences, and, it may be, hardships, may result to the people of the United States from time to time if that construction is adopted.

For instance, a vast majority of the people of three fourths, or perhaps nine tenths, of the states of the Union might be desirous

[7] 238 U. S. 368, 35 Sup. Ct. Rep. 932 (1915).

of having an amendment providing for or permitting uniform laws for the regulation of child labor in factories, etc., so as to prevent one state from securing advantages over another in the matter of manufacturing, and, under the suggested construction of the Constitution, the people would be powerless for a long time to remedy these conditions. So with reference to the laws regulating divorce; and doubtless many other illustrations will suggest themselves.

If this should prove to be the case, however, it will only demonstrate the fact that the Union, which the framers of the Constitution provided for, had not proven, in actual operation, to be so perfect as they had hoped. Indeed, as the result of these causes, it may prove extremely imperfect; but if the views hereinabove expressed as to the dangers to be feared from sustaining the validity of amendments which take away one after the other the local legislative powers of the states be in any degree well founded, the choice then presented to the American people may be one between an imperfect Constitution and no Constitution at all.

A little consideration will show, on the other hand, that after excluding from the scope of the amending power such amendments as take away legislative powers of the states there is still left a very broad field for its operation.

All sorts of amendments might be adopted which would change the framework of the federal government, — the thing which the Constitution was created to establish, — which would change the distribution of power among the various departments of that government, place additional limitations upon them, or abolish old guarantees of civil liberty and establish new ones.

It may be that the Supreme Court, when this question shall be presented to it, in the future will consider itself obliged to take a different view of the limitations of the amending power than that which is here suggested.

In that event, the judgment of that great tribunal will, of course, be accepted by the country as finally disposing of the question, but it will mean that the framers of the Constitution of the United States have failed in their efforts to establish and secure to their posterity forever the benefits of a perpetual union of "indestructible states," by failing to clothe the Supreme Court of the United States with the power necessary to insure that perpetuity, by preserving the integrity of the states.

Of course no attempt has been made in this article to discuss this vast question exhaustively, or to present all the arguments which could be made against the validity of constitutional amendments of the character considered. The writer will be quite content if what has been suggested herein shall have the effect of arousing the good minds of the legal profession of the country sufficiently to provoke further discussion of the subject.

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